UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5458
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO AVILES,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Florida

Before HILL, KRAVITCH and HENDERSON, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

November 10, 1982

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Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

After a jury trial, Antonio Aviles was convicted of distribution of a controlled substance, 21 U.S.C. Section 841(a)(1) (two counts); unlawful travel in interstate commerce to facilitate unlawful activity, 18 U.S.C. Section 1952 (two counts); and attempt to possess with intent to distribute a controlled substance, 21 U.S.C. Section 846 (one count). At the same trial, he was acquitted on a sixth count, which alleged a conspiracy to distribute in violation of 21 U.S.C. Section 846. Aviles now appeals the judgment of conviction.

The facts pertinent to his appeal may be briefly stated. The government chief witness at the trial, Tommie Savage, had himself been convicted of drug trafficking. Savage's testimony focused on two distinct series of alleged transactions. First, he described a number of trips he made from Pensacola, Florida, to New York City over a two year period. According to Savage, he had traveled to New York on several occasions, both alone and with an accomplice, to purchase heroin and cocaine from the defendant. He also testified to meetings with another dealer, identified only as "Pete". Apparently, Pete was

present during several earlier transactions between Savage and Aviles, and later, Savage made purchases from Pete without the defendant's knowledge. Those various alleged activities formed the basis of the conspiracy count of the indictment.

Savage also testified about a similar series of drug purchases from Aviles occurring in Pensacola, which provided the factual basis for the other five counts. At the time of these later transactions, Savage had been convicted and had commenced cooperating with the police. Several law enforcement officials, who observed and monitored those meetings, corroborated Savage's account. Additionally, a fingerprint expert testified that Aviles' prints matched prints on the bags of drugs Savage gave to police immediately after his meetings with the defendant.

Most of the defendant's assignments of error relate to the count for which he was acquitted — the conspiracy count. He claims that several alleged errors concerning the charge, and the evidence proffered to prove it, had a prejudicial spill-over effect on the jury's consideration of the substantive counts.[1/]

In effect, he urges that "cross-count prejudice" tainted his convictions on the substantive counts. See United States v. Parr, 509 F.2d 1381,1383 (5th Cir. 1975). "We have recognized the possibility of such prejudice, at the same time indicating that only in an unusual case would it be grounds for reversal." 509 F.2d at 1383-1384, citing United States v. Meriwether, 486 F.2d 498,504 (5th Cir. 1973), cert. denied, 417 U.S. 948, 94 S.Ct. 3074, 41 L.Ed.2d 668 (1974).

1/ More specifically, Aviles maintains there was a fatal variance between the indictment, which charged a single conspiracy, and the proof, which he contends suggested multiple conspiracies. He also disputes the district court's denial of his motion for judgment of acquittal on the conspiracy count. Similarly, he argues that the lack of sufficient evidence rendered the indictment on the conspiracy charge improper in the first place. Finally, reasoning that he should not have been indicted for conspiracy, he asserts that evidence of the New York transactions was inadmissible under Fed. R. Evid. 404(b)

Aviles does not cite any unusual circumstances in this instance which would warrant a reversal. He has presented "no specific evidence of prejudice or confusion on the part of the jury." United States v. Moynagh, 566 F.2d 799,805 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978). The conspiracy count focused on alleged transactions completely distinct in time and place from those charged in the substantive counts. See Parr, 509 F.2d at 1384; United States v. Febre, 425 F.2d 107, 113 (2nd Cir.), cert. denied, 400 U.S. 849, 91 S.Ct. 40, 27 L.Ed.2d 87 (1970). The trial court also instructed the jury to consider each count of the indictment separately. See Meriwether, 486 F.2d at 504; Moynagh, 566, F.2d at 805.Under these circumstances, we find no indication that consideration of the conspiracy count infected the convictions on the other five counts. See Meriwether, 486 F.2d at 504.

Moving to his convictions on the five substantive counts, Aviles asserts that testimony by one of the investigating officers was improperly admitted, both because it pertained to prior bad acts and because it was hearsay. In his testimony, Lieutenant L.A. Davis remarked that he had received information three years

earlier, from an undisclosed source, on Aviles' drug activities in the Pensacola area. The defendant's attempt to exclude this evidence comes too late. He did not object to the question, or move to strike the response, during the trial as required by Fed. R. Evid. 103. Therefore, the objection may not be raised on appeal absent plain error. E.g., United States v. McLeod, 608 F.2d 1076,1078 (5th Cir. 1979). Finding no plain error, we do not address the admissibility of the testimony. Nevertheless, in view of the extensive evidence presented at the trial respecting the specific drug transactions, the admission of Lieutenant Davis' passing comment, even if error, was harmless.

Aviles also claims that the government presented insufficient credible evidence to support a guilty cerdict on the five substantive counts. The gist of his argument is that Savage's testimony is unworthy of belief as a matter of law. In evaluating a challenge to the sufficiency of the evidence, we must, of course, view the facts in the light most favorable to the government. Glasser v. United States, 315 U.S.60,62 S.Ct. 457, 86 L.Ed. 680 (1942). This inquiry requires accepting all reasonable inferences and credibility

choices that tend to support the jury's verdict. E.g., United States v. Mitchell, 666 F.2d 1385 (11th Cir.) cert. denied, ___U.S.___, 102 S.Ct. 2943, 73 L.Ed.2d 1340 (1982). Furthermore, since the jury is the "ultimate arbiter" of credibility, "(o)nly when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law." United States v. Lerma, 657 F.2d 786 (5th Cir. 1981), cert. denied, ___U.S.___, 102 S.Ct. 1279, 71 L.Ed.2d 463 (1982). Contrary to Aviles' contention, a rational jury could easily and justifiably have believed Savage's account of the transactions. Moreover, law enforcement officials substantially corroborated his story. Confronted with such testimony, "a reasonable trier of fact could find that the evidence establishe- guilty beyond a reasonable doubt." United States v. Bell, 678 F.2d 547,549 (5th Cir., Unit B 1982) (en banc). Accordingly, the defendant's challenge to that evidence must fail.

Finally, Aviles alleges that the judge sentenced him one day after the return of the verdicts, thereby precluding sufficient time to prepare a proper pre- sentence report. This statement of the sequence of

events is in error. As the government points out, the record reveals that the jury rendered its verdict on March 4, 1982 and the court did not impose sentence until March 24, 1982. In that three-week interim, the customary presentence investigation was conducted. This contention, like the defendant's other assignments of error, lacks merit. The conviction is therefore

A F F I R M E D .